IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 5TH MARCH 2007 / 14TH PHALGUNA 1928

Crl.Rev.Pet.No. 2023 of 2005()

CRA.290/2003 of ADDL.SESSIONS COURT, THODUPUZHA
SC.395/2001 of ASSISTANT SESSIONS COURT, KATTAPPANA
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REVN. PETITIONER: ACCUSED/APPELLANT:

JOHN @ JOY, S/O.GEORGE,
PARAPPARAMBIL HOUSE, PALLIKKUNNUKARA,
ELAPPARA VILLAGE.

BY ADV. SRI.RAJA VIJAYARAGHAVAN

RESPONDENT:COMPLAINANT/RESPONDENT:

STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.SURESHKUMAR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 05/03/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.HEMA,J

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Crl.R.P.NO.2023 OF 2005

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Dated this the 5th day of March, 2007

ORDER

The revision petitioner was convicted and sentenced under Section 55 (a) and (i) of the Abkari Act to undergo rigorous imprisonment for three years and to pay a fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for another three months by the Assistant Sessions Judge. In appeal filed, revision petitioner was acquitted of offence under Section 55 (i) of the Abkari Act and the sentence passed under Section 55(a) of the Abkari Act was modified to undergo simple imprisonment for two years and to pay a fine of Rs.1,00,000/- and in default to undergo simple imprisonment for three months.

2. According to the prosecution, on 09.071999 at about 2.p.m, the accused kept in possession of 26 bottles of Kings Brandy containing 750 ml each for the purpose of sale on the north-eastern corner in a hotel building with No.284 of Peermedu Panchayat at Pallikkunnu. without any authority and hereby committed offence under Section 55 (a) (h) and (i) of Abkari Act. To prove the prosecution case, PW1 to PW5 were examined and Exts.P1 to P5 and P3 were marked. On an analysis of the evidence adduced in the

prosecution both the trial court as well as the appellate court found that the contraband articles were seized from the premises of the shop which is in possession of the accused and therefore, found him guilty of offence under Section 55 (a) of the Abkari Act.

3. The learned counsel for the revision petitioner's argued that there is no evidence to show that accused was in possession of the shop from which the article was seized. On going through the evidence and the materials placed before the court, I do not find any reason to reject this argument. Admittedly, the contraband article was not seized from the physical possession of the revision petitioner. The article is allegedly seized from the northern side of the shop. Therefore criminal liability can be fastened on the accused only if the prosecution proves that the shop either belongs to the accused or it is in his possession of the accused.

4. PW5 is Sub Inspector who allegedly seized the article from the place of occurrence. He gave evidence in cross examination that the shop belongs to one “Yesudas”. In Ext.P1 search list it is mentioned that the property belongs to “Yesudas”. The said “Yesudas” was not examined in this case. PW5 claimed that he is no more. The death is disputed. Even if he is no more, he may have legal heirs. When a contraband article is seized from a building, the

owner is primarily liable for the possession unless possession is transferred to another person. The owner of the shop is not in the picture here. He has not been examined as a witness.

5. In the absence of the examination of the owner, the prosecution has to at least procure documents to prove the possession of the building by the accused. If building owned by one person is occupied by another and possession is given to another person, there will normally be some documents to prove such possession. If the case of the prosecution is that the building is in possession of the accused as a person conducting the business in the shop, there must be some documents to prove the same. He might be in occupation on rental arrangements in which case some rent will be paid and there may be receipts or rent deed. But no document is forthcoming to prove the possession of the shop by the accused.

6. If a tea shop is run in a building normally there will be documents in the local authority to prove in whose possession building is. Though the prosecution would claim that the accused is conducting tea shop in building No.284 in peermedu Panchayat at Pallikkunnu, no document is produced from the Panchayat to prove the case of prosecution. PW5 deposed that he had not verified the documents such as Panchayat register. In the absence of examination

of the owner and on failure to procure any documents from the owner or the local authority to prove the possession, it has to be held that prosecution failed to establish possession of the building by the accused. The evidence of PW1 shows that the shop is conducted by not only accused but some other persons also. It has been recorded in Ext.P4 that the building is used for running tea shop. It is mentioned in Ext.P1 that shop is run by accused and others. It is in evidence that the accused's wife is also running the shop. Thus, even the oral evidence is not satisfactory regarding the exclusive possession of the building by the petitioner. If as a matter of fact, the business in the relevant building is run by the petitioner and others even as per the admitted evidence of PW5 exclusive Criminal liability cannot be on the revision petitioner, since others also will be accountable for the possession. No attempt is made to prove the exclusive possession of the building by the accused in this case and hence he cannot be held guilty for possession of the contraband article seized from the relevant building.

7. The evidence of PW5 is not supported by any independent evidence. PW1 is the witness who attested Ext.P1. He has specifically stated in the chief examination that the article was not seized from the accused's shop. PW1 stated that the article was

ceased seized from the building which is laying on the western side of the place of occurrence. It is also stated by him that there was a protest by the brother of the accused when the police attempted to make it appear that the article taken from the shop of the accused. The alleged agitation is admitted by PW5 and PW3. PW2 the police official, who was present along with the police party stated that the accused's brother and the accused were arrested. According to PW5 accused brother had protested and interfered in the official duty and hence, he was also arrested.

8. In the above circumstances, unless there is satisfactory oral and documentary evidence to prove possession, the evidence given by PW5 and PW2 cannot be acted upon to convict the accused. It appears from the evidence of PW3 the Circle Inspector that there is some mistake in the name of the Panchayat and he had filed a report as Ext.P2 to correct the mistake. He did not remember ward number. He also admitted that he had not verified the panchayat records. He stated that the ward number and the building number are not correct. In such circumstances, unless there is satisfactory evidence to prove that the accused was in possession of the building he cannot be found guilty of offence under Section 55(a) of the Abkari Act.

9. Learned Public Prosecutor vehemently contented that there are indications in the evidence of PW1 the hostile witness that the article was seized from the shop of the accused. But his evidence itself shows that both the accused and the brother used to sit in the shop. The evidence of a hostile witness to the above effect of this case is not conclusive regarding the possession of the building by the accused. It is not proper for the court to enter a conviction on the basis of such evidence given by the hostile witness alone which may indirectly indicate that accused may also be in possession of the shop.

10. Learned Public Prosecutor also argued that there is provision available under Section 64 that in prosecution under Section 55 it shall be presumed unless the contrary is proved that the accused committed offence under that Section in respect of possession of the article which the accused is unable to account for satisfactory. Section 64 of the Abkari Act shows that it is only if possession of article by the accused is proved that the presumption would arise, if such possession is not accounted for. Therefore, presumption under Section 64 of the Abkari Act also will not be sufficient to prove the guilt of the accused.

11. In the circumstances, I find that the conviction of sentence passed against the petitioner are unsustainable. Accused is

not found guilty of offence under Section 55 (a) of Abkari Act.

This revision petition is allowed.

K.HEMA,JUDGE

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